Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies	IB Docket No. 05-221

COMMENTS OF SIRIUS SATELLITE RADIO INC.

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Sirius Satellite Radio Inc. ("Sirius"), by its attorneys, hereby comments on the Federal Communications Commission's ("FCC" or "Commission") request for views "on three options for redistributing or reallocating the remaining one-third of the [recently surrendered] 2 GHz MSS spectrum that [the Commission] did not address in [its] previous public notice."[1] In particular, the Commission asks for comment on (1) "TMI's and ICO's proposals and associated comments to divide the remaining one-third of the 2 GHz MSS spectrum between them"; (2) "whether the remaining one-third should be made available to new MSS licensees"; and (3) "whether any of the remaining one-third of the spectrum should be made available for reallocation for another service, and if so, which specific frequency bands should be reallocated."[2]

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[1] *See Commission Invites Comments Concerning Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies*, Public Notice, FCC 05-134, IB Docket No. 05-221 (June 29, 2005) ("*2 GHz Surrendered Spectrum Public Notice*"). In a related proceeding, the FCC also sought comment on its proposal to distribute a portion of newly-surrendered 2 GHz MSS spectrum to ICO Satellite Services ("ICO") and TMI Communications and Company Limited Partnership ("TMI"). *See Commission Invites Comments Concerning Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies*, Public Notice, FCC 05-133, IB Docket No. 05-220 (June 29, 2005) ("*2 GHz Redistribution Public Notice*").

[2] *2 GHz Surrendered Spectrum Public Notice* at 1-2. "Under this third option, the Commission would issue a Notice of Proposed Rulemaking inviting comment on such a reallocation." *Id.* at 2.

I. INTRODUCTION AND SUMMARY.

The Commission should reallocate the 24 MHz of unassigned 2 GHz satellite spectrum to satellite digital audio radio service ("satellite DARS" or "SDARS") and, in particular, assign that spectrum to Sirius. Sirius' innovative efforts in designing, building, and launching its satellite DARS service have dramatically expanded the audio choices available to consumers nationwide. Indeed, the success of Sirius' satellite DARS offering is evidenced by its high consumer demand, subscriber growth, and subscriber satisfaction. But Sirius' 12.5 MHz of downlink spectrum is fully loaded, and Sirius needs additional spectrum to allow for its continued success, subscriber and programming growth, and further innovation.

Satellite spectrum is a limited natural resource that should be preserved for use by satellite services. But no additional 2 GHz spectrum should be assigned to any MSS licensees. The promise of MSS is still uncertain, and it would be imprudent for the Commission to assign additional, high-quality spectrum resources to this service. The existing MSS licensees are not operational, cannot demonstrate system loading, and thus do not warrant additional spectrum at this time.

Auctioning the available 2 GHz spectrum for flexible use would also not be appropriate under the circumstances. An auction would appear to be either forbidden under recent D.C. Circuit caselaw, or unjust in that the procedural decision to hold an auction would determine its substantive results by excluding parties that were deemed to be providing international services.

Assigning the full 24 MHz of 2 GHz spectrum to Sirius, by contrast, would be in the public interest. Sirius needs spectrum to further grow its business and rollout additional innovative services. The unassigned spectrum is ideal for satellite DARS and close to Sirius' existing frequencies, which will allow it to be used on Sirius' next generation satellites. Moreover, the additional downlink spectrum will enable Sirius to expand its programming, and

allow for innovative new offerings, such as "video" and broadband. Likewise, the additional uplink spectrum will permit the deployment of innovative services, such as "push to buy" functionality and telematics for data downlink return. The uplink spectrum also will provide for additional terrestrial repeaters, so that Sirius can further improve the delivery of its service in areas not well served by its satellite constellation.

Accordingly, the Commission should initiate a rulemaking that proposes to (1) reallocate the 24 MHz of unassigned 2 GHz spectrum to satellite DARS, and (2) assign the full 24 MHz of spectrum to Sirius. At the very least, the Commission should consider in a single rulemaking all of the options for such spectrum, to fulfill its spectrum management obligation to ensure that the 2 GHz spectrum is used efficiently and effectively.

II. SIRIUS IS A SUCCESSFUL SATELLITE VENTURE THAT REQUIRES ADDITIONAL SPECTRUM.

Sirius' satellite DARS business is one of the most successful satellite ventures in recent years. More than fifteen years ago, on May 18, 1990, Sirius sought the first-ever license to revolutionize and revitalize mass market radio. At that time, satellite DARS was an unproven concept premised on improvements in signal quality, multiple channels, and nationwide coverage. Sirius developed the technology necessary to provide satellite DARS, identified the requisite spectrum, and spearheaded the effort to have it reallocated – both domestically and internationally – for satellite DARS. Additionally, Sirius raised the money (in the form of both equity and debt) sufficient to run its business, acquired its spectrum license at auction for $83,346,000,[3] and spent over $900 million for the construction of its satellite network. In sum,

[3] *FCC Announces Auction Winners for Digital Audio Radio Service*, Public Notice, 12 FCC Rcd 18727 (1997).

Sirius has spent over $2 billion to date to build its system and launch and operate its satellite radio business.

Sirius' innovation has expanded exponentially the audio choices available to consumers nationwide. In particular:

- Sirius broadcasts over 120 digital-quality channels, including 65 channels of 100% commercial-free music (from heavy metal and hip-hop to country, dance, jazz, Latin and classical) and 55 channels of diverse sports, news and talk (including special interest programs focused on comedy, public affairs, the arts, the trucking life and the full political spectrum from liberal "left" to conservative "right").

- Sirius, together with MultiCultural Radio Broadcasting Inc., a multi-ethnic radio operator, will offer Asian language channels, initially including a Korean channel and later a Chinese channel.[4]

- Sirius provides "around-the-clock" traffic and weather reports for the top 20 U.S. traffic markets.

- Sirius offers the most comprehensive sports coverage available on radio, featuring news, talk, and play-by-play action from the NFL, NHL, NBA, Barclay's English Premier League soccer, the Wimbledon Championships, the Arena Football League, and more than 115 colleges, plus live coverage of thoroughbred horse racing.

- Sirius' unique listening experience is available to more than 10 million SIRIUS Satellite Radio subscribers and DISH Network satellite TV users from coast-to-coast, including rural and mountainous sections of the country that have been historically underserved by terrestrial radio.

- Sirius' service can be used in cars, trucks, RVs, homes, offices, stores, boats (up to 200 miles offshore) and the "great outdoors."

- All of this programming is currently available to consumers for a monthly subscription fee of $12.95, with savings for upfront payments of multiple months or a year or more.

[4] Press Release, Sirius Satellite Radio, Sirius Satellite Radio to Launch Chinese and Korean Language Channels (June 28, 2005), *available at* http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=167440&cat=Programming%20Announcements&newsroom=.

The success of satellite DARS is evidenced by that fact that Sirius and XM are experiencing high consumer demand, subscriber growth, and subscriber satisfaction. As of March 31, 2005, Sirius had 1,448,695 subscribers. This figure reflects net additions of 305,437 subscribers in the first quarter of 2005 and, although second quarter 2005 subscriber figures are not yet publicly available, the company expects to announce outstanding subscriber growth for the period. Importantly, Sirius' historically low churn reflects high customer satisfaction with its premier programming.[5] Sirius' revenue growth confirms the SDARS success story. For the first quarter of 2005, Sirius recognized total revenue of $43.2 million, compared with $9.3 million for the first quarter of 2004, a 365% year-over-year increase. This increase in revenue was driven by a net increase in the company's subscriber base.

Additional spectrum would enable Sirius to offer consumers even more programming choices. Sirius currently employs the 2320-2332.5 MHz frequency band for its downlink satellite DARS operations and the 7025-7075 MHz band for its feeder uplink.[6] To maximize the efficiency of its current spectrum resources, Sirius has employed all available compression techniques while still maintaining the highest sound quality.[7] Even with these gains in spectrum efficiency, Sirius' 12.5 MHz of downlink spectrum is fully loaded. As a result, Sirius needs more spectrum for its widely popular, fast growing service.

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[5] For example, in the first quarter of 2005, Sirius also reported average monthly churn of 1.3%.

[6] *Sirius Satellite Radio Inc., Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, Order and Authorization, 16 FCC Rcd 5419, 5429 (¶¶ 29-30) (2001) ("*Sirius Authorization*").

[7] Although Sirius has recently developed a proprietary modulation technology to enhance system efficiency, *see* Press Release, Sirius Satellite Radio, Sirius to Increase Programming Capacity Over Its Existing Satellite Radio System, Sirius (June 13, 2005), *available at* http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=165885, Sirius will reach the limits of this technology.

III. THE FCC SHOULD REALLOCATE 24 MHz OF UNUSED 2 GHz SATELLITE SPECTRUM TO SATELLITE DARS.

As Sirius noted in the related proceeding, the Commission should not increase the spectrum assignments for the two remaining MSS licensees unless and until the FCC is able to determine in a single rulemaking proceeding that no other use of the spectrum would better serve the public interest.[8] The Commission should find that reallocation of the entire 24 MHz of unassigned 2 GHz MSS spectrum for use by satellite DARS is in the public interest and, additionally, assign the full 24 MHz of reallocated spectrum to Sirius.

A. The Public Interest Requires Preservation of "Satellite" Spectrum.

The Commission has long recognized that satellite "frequency spectrum is a limited natural resource"[9] and, moreover, that it is in the public interest to "make more effective use of scarce radio spectrum for satellites."[10] Part and parcel of its scarcity is combating the inefficient

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[8] *See* Comments of Sirius Satellite Radio Inc., IB Docket No. 05-220, at 3-5 (July 13, 2005) ("Sirius Comments").

[9] *An Inquiry Relating to Preparation for the International Telecommunication Union World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It*, Second Report and Order, 3 FCC Rcd 2894, App. 30B (1988). *See also Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States and Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, Report and Order, 12 FCC Rcd 24094, 24158 (¶ 149) (1997) ("*Disco II Order*") ("Given the scarcity of available orbit and spectrum resources, it often is not possible to issue licenses to all entities that participate in a processing round."); *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, 10768 (¶ 10) (2003) ("*Orbital Debris Order*") ("If, as is often the case, there are not enough orbital locations and/or there is not sufficient spectrum available to accommodate all the qualified applicants, we afford the applicants an opportunity to negotiate 'mutually agreeable' compromises so that all the applications can be granted.").

[10] *Processing of Pending Space Station Applications in the Domestic Fixed Satellite Service*, Memorandum Opinion and Order, 77 FCC 2d 956, 959 (¶ 7) (1980) ("[W]e believe that it is in the public interest to begin encouraging the development of a new generation of satellites that will be more efficient and make more effective use of scarce radio spectrum for satellites."). *See also PanAmSat Licensee Corp., New Application for Launch Authority*, Order and Authorization, 19 FCC Rcd 2012, 2014 (¶ 8) (Int'l Bur. 2004) (denying PanAmSat's request for

use of satellite spectrum. Thus, the Commission has adopted a bond requirement in the satellite context to "discourage[] licensees from warehousing scarce orbit and spectrum resources while they decide whether to proceed with construction of their satellite."[11] It has likewise noted in the MSS context that "warehousing undercuts decisions by the Commission to allocate scarce spectrum resources to satellite services over other competing services."[12]

Given the scarcity of satellite spectrum, it is axiomatic that the unassigned 2 GHz spectrum must be preserved for use by *satellite* services. This is particularly true given the fact that the 2 GHz spectrum block is high quality and very well suited for mobile satellite services such as satellite DARS. The Commission has recognized that the "2 GHz band has ideal propagation characteristics for mobile services . . . , which must transmit along unengineered paths from unpredictable locations."[13] In fact, this was a primary reason behind the Commission's decision to transition the fixed service out of the 2 GHz band and free up the spectrum for mobile satellite services.[14] And the need to retain the 2 GHz spectrum for satellite

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a waiver of the Commission's full frequency reuse requirement because "[I]n adopting this requirement, the Commission sought to maximize use of the scarce orbit/spectrum resource").

[11] *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Order on Reconsideration and Fifth Report and Order, 19 FCC Rcd 12637, 12645 (¶ 17) (2004).

[12] *Joint Application for Review of Constellation Communications Holdings, Inc., Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited*, Memorandum Opinion and Order, 19 FCC Rcd 11631, 11633 (¶ 2) (2004) ("Consequently, to ensure that unused spectrum is reassigned as quickly as possible, the Commission has strictly enforced the construction commencement milestone.").

[13] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz For Use By the Mobile-Satellite Service*, First Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 7388, 7401 (¶ 31) (1997).

[14] Indeed, in the Emerging Technologies proceeding, the FCC expressly determined that no other spectrum would be as ideal for mobile services as the 2 GHz frequencies. *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Notice of Proposed Rule Making, 7 FCC Rcd 1542, 1544 (¶ 12) (1992) ("*Emerging Technologies NPRM*") ("[W]hile experimental mobile use is taking place at higher bands, the state-of-the-art technology for the compact, lightweight, portable electronic components

services is buttressed by the commercial realities of the satellite marketplace: Without a foundation of sufficient spectrum resources, operational satellite systems are structurally impaired from keeping pace with rapidly changing market dynamics.[15]

For its continued success in serving the public, and to enable it to continue to offer innovative services, Sirius is seeking additional spectrum. Given that the unassigned 2 GHz spectrum is particularly well suited for use by satellite DARS, the 2 GHz satellite spectrum should be preserved for use by satellite providers, allocated to satellite DARS, and assigned to Sirius.

B. No Additional 2 GHz Spectrum Should Be Assigned to the MSS Licensees.

The need to preserve the 2 GHz spectrum for satellite service, however, does not counsel for either retaining the MSS allocation or granting the existing MSS licensees additional spectrum. The promise of MSS is still uncertain,[16] and it would be imprudent for the Commission to assign additional, high-quality spectrum resources to this service.

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expected to be used in new services generally will limit operations in those services to frequencies under 3 GHz. … [Moreover,] spectrum below 1 GHz generally does not appear to offer any possibilities for spectrum availability [for mobile services].”). Accordingly, the FCC decided to transition fixed users, which could operate in other bands, out of the valuable 2 GHz spectrum in order to “encourage the larger and more effective use” of this spectrum by mobile operators. *Id.* at 1543 (¶ 8).

[15] As the D.C. Circuit explained over 20 years ago in *United States v. FCC*, 652 F.2d 72, 95 (D.C. Cir. 1980) (en banc): “In this dynamic and technologically innovative industry, a proposed venture may become obsolete in just a few years. Even without regulatory delay, a satellite firm is faced with the daunting prospect of time-consuming research and construction, which entail advance planning and risky lead time – and which may lead to naught.”

[16] The spotty history of MSS begins in the 1990s with the Big LEO frequency bands. In the early 1990s, there were six applicants proposing to offer MSS in the Big LEO bands. *See Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands*, Report and Order, Fourth Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 13356, 13358-60 (¶¶ 4-7) (2004) (“*Big LEO Spectrum Sharing Order*”). The International Bureau between 1995 and 1997 granted licenses for five MSS systems and dismissed the sixth licensee’s application. *Id.* at 13364-65 (¶ 19). Of the five licenses, one was returned to the Commission in 1998 and two others were ruled null and void for failure to meet construction deadlines. *Id.* at 13365 (¶ 20). Thus, only two of the original six MSS applicants actually commenced commercial operations – Motorola Satellite

Indeed, it would be premature to assign additional 2 GHz spectrum to *any* MSS provider. The Commission's longstanding precedent dictates that any assignment of additional, follow-on spectrum be based on commercial experience and, in particular, system loading.[17] Likewise, any demonstration of need for additional spectrum must be based on *detailed information* from the licensee about its operations and spectrum requirements before assigning such additional spectrum.[18] The existing MSS licensees do not meet these stringent tests.[19] Their systems *are*

Communications, Inc. ("Motorola") with its Iridium system in 1998, and Loral Qualcomm Partnership ("LQL"), with its Globalstar system in 2000. *Id.* at 13366 (¶ 21). Unfortunately, the Motorola subsidiary with principal financial responsibility for Iridium filed for Chapter 11 bankruptcy protection in 1999, and the parent of the companies holding certain Globalstar licenses suffered the same fate in 2002. *Id.* at 13366-67 (¶¶ 22-23).

It is a well-known fact that the failure of the Big LEO MSS systems was caused primarily by the rapid growth, and consumer adoption, of terrestrial wireless services. Having made it to the game even later than the Big LEO crowd, the proposed MSS providers in the 2 GHz band have fared no better. *See, e.g.*, Comments of Inmarsat Ventures Limited, IB Docket No. 05-220, at 2-4 (July 13, 2005) ("Inmarsat Comments"); Sirius Comments at 1-2. Only two putative MSS operators remain authorized to provide MSS in the 2 GHz band. *See 2 GHz Redistribution Public Notice* at 1. These two licensees each currently have the right to select 8 MHz of unassigned 2 GHz MSS spectrum (4 MHz of uplink spectrum and 4 MHz downlink spectrum) from the 2000-2020 MHz uplink band and the 2180-2200 MHz downlink band. *See ICO Satellite Services G.P.*, Memorandum Opinion and Order, DA 05-1504, ¶ 34 (May 24, 2005); *TMI Communications and Company, Limited Partnership and TerreStar Networks Inc., Application for Review and Request for Stay*, Memorandum Opinion and Order, 19 FCC Rcd 12603, 12622 (¶ 54) (2004).

[17] *See, e.g., Amendment of Part 90, Subparts M and S, of the Commission's Rules*, Report and Order, 3 FCC Rcd 1838, 1842 (¶ 39) (1988) ("[N]o licensee can obtain additional channels if its existing channels are not fully loaded."); 47 C.F.R. § 90.658(d) ("The FCC will use the loading data required by this section to determine whether the licensee's existing system has a sufficient number of mobiles as required by [our rules] to qualify for additional channels."); *Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations*, 54 RR 2d 577, 602 (¶ 84) (1983) (placing an "upper limit on in-orbit spare capacity" and concluding that failure to demonstrate that the satellite is sufficiently loaded "will result in the termination of the orbital assignment" or "relocation … to accommodate another satellite").

[18] *See, e.g., Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rule-Making, 18 FCC Rcd 1962, 2090 (¶¶ 267-69) (2003) ("*Big LEO NPRM*") ("[W]e seek detailed comment regarding its actual current spectrum use and substantiated projections of its future spectrum requirements. … We also seek technical information on Iridium's current and projected spectrum use. We seek comment on how efficiently Iridium is using its current spectrum and, if we were to make more Big LEO spectrum available, exactly how much additional spectrum

not constructed. Without commercial experience, the existing MSS licensees cannot now demonstrate system loading and thus do not warrant additional spectrum at this time. Accordingly, increasing spectrum assignments to the existing MSS licensees would not result in the best use of high-quality spectral resources and would not serve the public interest.

C. The FCC Should Allocate This Spectrum for Satellite DARS and Assign it to Sirius.

Launching a rulemaking to allocate the full 24 MHz of 2 GHz spectrum for satellite DARS, by contrast, would be in the public interest. The 2 GHz MSS spectrum is ideally suited for satellite DARS systems. Its propagation characteristics and close proximity to the existing DARS allocation will foster speedy deployment in the band.[20]

The additional downlink spectrum will enable DARS to expand its service channel programming, which will increase the diversity of programming available to consumers

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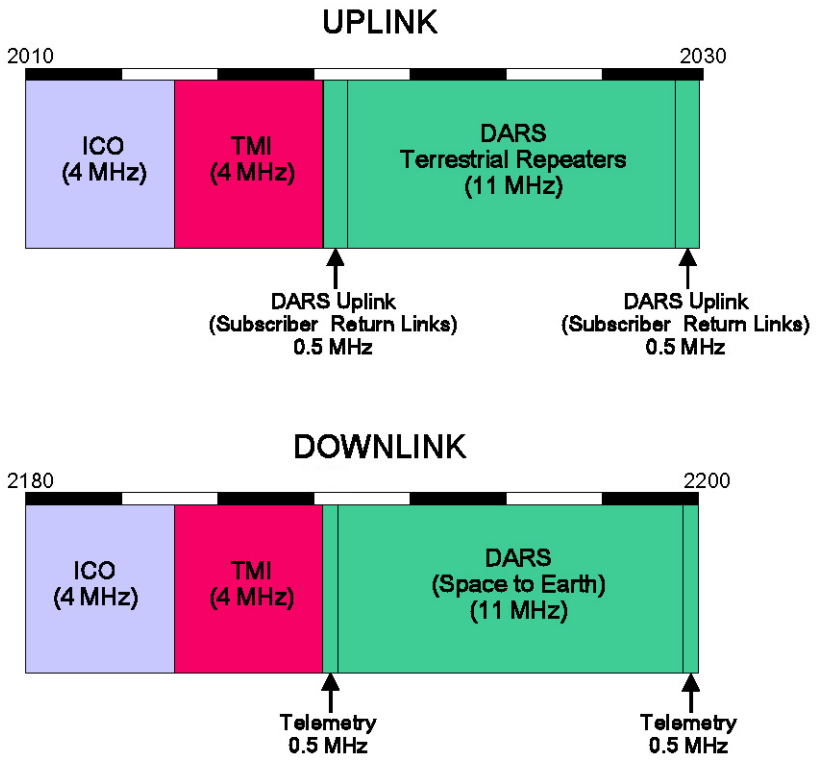
would be appropriate. … In addition, we seek comment on how Globalstar is using its assigned spectrum."); *The Trustees Of Indiana University, Indianapolis, Indiana For Modification of the Authorized Instructional Television Fixed Service Facility of WHR-808 on Channels B1, B2, B3, and B4*, Memorandum Opinion and Order, 8 FCC Rcd 5555, 5558 (¶ 21) (1993) ("[T]o insure the efficient utilization of spectrum, every applicant must demonstrate the need for each channel requested." (citing 47 C.F.R. § 74.902(d)(1))).

[19] Contrary to ICO's attempt to erect a procedural hurdle to a full and open consideration of the proposed grant of spectrum to the existing MSS licensees, *see* Reply Comments of ICO Satellite Services G.P., IB Docket No. 05-220, at 3-4 (July 25, 2005) (claiming that the opponents of the proposed spectrum grant lack standing), in its Public Notice the Commission expressly sought comment from parties beyond those required by Section 316, *see 2 GHz Redistribution Public Notice* at 1-2 ("Although we are not required to seek additional comment under Section 316, we find in this case that it would be in the public interest to do so."). Indeed, even if ICO were correct that the opponents of the spectrum grant lack standing, it would only further highlight the fact that the current bifurcated process not only is inefficient for addressing the surrendered spectrum issue but also unnecessarily constrains both public input and the Commission's review of proposed uses for the spectrum, and thus fails to build the full and complete record that is required. *See* Sirius Comments at 4-5.

[20] In this regard, it bears noting that the Commission originally allocated 50 MHz of spectrum to satellite DARS, but cut that spectrum allocation in half when the WCS allocation was created. *See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, 12 FCC Rcd 10785, 10790-91, 10797-98 (¶¶ 12, 25) (1997).

nationwide. It will also allow for innovative new "video" and broadband offerings. The additional uplink spectrum will permit the deployment of innovative services, such as "push to buy" functionality, which could allow consumers to purchase music and other items on demand, or telematics for data return. In addition, the uplink spectrum will provide for the operation of additional terrestrial repeaters, allowing seamless service in "urban canyons," tunnels, and other areas not well served by its satellite constellation.

One possible band plan would be to allocate the 2188-2200 MHz band for satellite DARS downlinks and the 2018-2030 for terrestrial repeater operations. More specifically, the relatively high powered terrestrial repeaters would be permitted in the 2018.5-2029.5 MHz band with two 500 kHz swaths at the band edges (2018.0-2018.5 and 2029.5-2030 MHz) for lower power subscriber return links:



Note: ICO and TMI have not yet received specific frequency assignments. For convenience, their spectrum holdings are depicted at the lowest frequencies of the two sub-bands.

Placing the low power mobile subscriber links on the band's outermost frequencies would provide greater compatibility with adjacent band licenses while reducing any potential interference from higher powered terrestrial repeater transmissions. This band plan has been constructed with a view to maximize satellite DARS capacity while providing interference to adjacent services that would generally be better but in no case worse than that which would be caused by the currently authorized MSS systems. This would be done by a combination of EIRPs and choices of modulation and will be further detailed during the anticipated Commission rulemaking proceeding.[21]

Moreover, licensing the full 24 MHz to Sirius will yield valuable public interest benefits. The Sirius system has been operational since February 14, 2002; an unqualified success story of the Commission's satellite allocation and licensing regime. As Sirius has explained, it is operating its satellite system at peak efficiency, but is nevertheless in need of additional spectrum to further accelerate the growth of its business and rollout additional innovative services. The band's close proximity to Sirius' existing frequencies will allow the 2 GHz spectrum to be readily included on Sirius' next generation satellites, serving the Commission's policy against spectrum warehousing.

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[21] The rulemaking proceeding should identify the specific 24 MHz of 2 GHz MSS spectrum that is being reallocated. The selected spectrum should be contiguous to allow for efficient use by satellite DARS. The two remaining 2 GHz MSS licensees would continue to be able to identify the specific frequencies of their Selected Assignments from the remaining 16 MHz of MSS spectrum pursuant to the current Selected Assignment procedure – *i.e.*, upon the first satellite in the MSS operator's system reaching its intended orbit. *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, 2230 (¶ 12 n.30) (2003) ("*AWS Third Report and Order*") ("Each 2 GHz MSS operator identifies the specific frequencies of its Selected Assignment when the first satellite in its system reaches its intended orbit and notifies the Commission in writing of its selection.").

D. The Commission May Not Rely on an Auction to Determine How the 2 GHz Spectrum Is Assigned.

Some commenters in the related proceeding have urged the Commission to allocate the spectrum for flexible use and make it available at auction to all parties.[22] Unfortunately, that approach would not produce the flexibility it purports to promote. Rather, the legal uncertainty created by the D.C. Circuit's recent *Northpoint Technology* decision[23] would appear inflexibly to bar most satellite proponents, including Sirius,[24] as Intel concedes in its reply comments.[25] Thus, contrary to the suggestion, an ostensibly procedural decision to conduct an auction would dictate that auction's substantive results by unjustly excluding a wide range of entities and proposed offerings from the licensing process.

Absent assignment flexibility, there is no public interest rationale to auction the vacant 2 GHz spectrum. As the Commission well knows, the statute forbids allowing possible future

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[22] *See, e.g.*, Reply Comments of Cingular Wireless LLC, IB Docket Nos. 05-220, 05-221, at 5 (July 25, 2005); Comments of CTIA – The Wireless Association™, IB Docket No. 05-220, at 5-6, 17 (July 13, 2005) ("CTIA Comments").

[23] *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005) ("*Northpoint Technologies*") (interpreting the ORBIT Act, 47 U.S.C. § 765f, as precluding auction of satellite licenses in bands permitting any international services). The D.C. Circuit remanded the issue "for the Commission's further consideration." *Id.* at 147.

[24] SIRIUS Canada Inc., a joint venture between Sirius and two Canadian broadcasters, was recently licensed to broadcast and sell its service in Canada. *See* Press Release, Sirius Satellite Radio, Canada Grants Broadcasting License to Sirius Canada (June 16, 2005), *available at* http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=166390&cat=General&newsroom=.

[25] *See* Reply Comments of Intel Corporation, IB Docket No. 05-220, at 5 (July 25, 2005) ("Unfortunately, it appears that the Commission may not have legal authority to implement such an ideal, flexible-use licensing scheme [employing an auction]. Under the Orbit Act, enacted by Congress in 2000, the Commission lacks authority 'to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services.' Because licensees obtaining the flexible-use licenses described above would be permitted to provide MSS and other international satellite services, the Commission may be precluded from assigning such licenses at auction." (footnote omitted)).

auction revenues to influence spectrum allocation decisions.[26] Accordingly, the agency should rule out auctions immediately, notwithstanding the potential contributions to the Treasury.

IV. THE COMMISSION SHOULD INITIATE A RULEMAKING PROCEEDING PROPOSING TO REALLOCATE THE 24 MHz TO SATELLITE DARS.

In light of the foregoing, the Commission should initiate a rulemaking proposing to (1) reallocate the 24 MHz of unassigned 2 GHz MSS spectrum to satellite DARS, and (2) assign the 24 MHz of spectrum to Sirius. Indeed, in the Commission's related proceeding concerning possible assignment of spectrum to the existing MSS licensees, the majority of commenters not only oppose giving any portion of the surrendered 2 GHz spectrum to those licensees, but favor the initiation of a rulemaking proceeding to develop a full and complete record concerning the public interest benefits of the various 2 GHz spectrum reallocation options.[27]

This is the prudent course of action for the Commission. The Commission should consider fully *in a rulemaking* all of the options – including "new proposals for use of the 2 GHz

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[26] *See* 47 U.S.C. § 309(j)(7)(A) ("[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding."); *Implementation of Section 309(j) of the Communications Act; Competitive Bidding*, Notice of Proposed Rule Making, 8 FCC Rcd 7635, 7637 (¶ 14) ("In making the spectrum allocation decisions . . . , the Commission is not permitted to base a finding of public interest, convenience, and necessity on the expectation of Federal revenues that would result from the use of competitive bidding.").

[27] *See* Comments of T-Mobile USA, Inc., IB Docket No. 05-220, at 10 (July 13, 2005) ("[T]he Commission should initiate a full notice and comment rule making to consider the reallocation of the relinquished 24 MHz of 2 GHz MSS spectrum. In this rule making, the Commission should consider all possible uses for this spectrum . . . . The Commission should not increase the spectrum reservations of TMI and ICO, as they have made no showing of the need for additional spectrum."); CTIA Comments at 17 ("[T]he Commission should find that, based on the current record, no rational basis exists to justify the intended reassignment of 2 GHz MSS spectrum. If further fact-finding demonstrates that the unassigned spectrum is to be used for terrestrial services, the Commission should commence a rulemaking to reallocate the spectrum . . . ."); Inmarsat Comments at 31 ("There is no good reason why the Commission should change course [from its prior practice of resolving spectrum assignment issues through rulemaking proceedings] and permit a redistribution of returned 2 GHz MSS spectrum without a comprehensive review of the issues . . . ."); Sirius Comments at 3-5; *see also* Comments of Globalstar LLC, IB Docket No. 05-220, at 6 (July 13, 2005) ("Any decision on 2 GHz MSS spectrum reservations . . . should be postponed until Globalstar's rights to the spectrum at issue are finally determined.").

MSS bands"[28] – to fulfill its "continuing spectrum management obligation[] to ensure that the [2 GHz MSS] spectrum is used efficiently and effectively."[29] This is particularly true given the Commission's prior practice of entering into rulemakings to determine spectrum reallocations in the *AWS Third Report and Order* and the *Big Leo Spectrum Sharing Order*.[30]

A rulemaking is the appropriate process for spectrum reallocation. This policy was employed in the MSS context in the *AWS Third Report and Order*,[31] and is equally applicable here. Moreover, given that the spectrum at issue is "unassigned and abandoned,"[32] there would be no disruption to the two remaining MSS licensees if the Commission were to reallocate the spectrum as Sirius proposes. Accordingly, the Commission should reallocate the 24 MHz of 2 GHz spectrum from "Mobile Satellite (Earth-to-space)" to "Broadcasting Satellite Service

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28 *ICO Services Ltd., Letter of Intent to Provide Mobile-Satellite Service in the 2 GHz Bands*, Order, 16 FCC Rcd 13,762, 13,765 (¶ 8) (Int'l Bur. 2001) ("*ICO 2 GHz MSS Order*"). Indeed, in the *AWS Third Report and Order*, the Commission considered and adopted proposals to reallocate part of the 2 GHz MSS spectrum in a rulemaking proceeding. *See generally AWS Third Report and Order*, 18 FCC Rcd 2223. Likewise, in the *Big LEO* matter, the Commission also employed a rulemaking to reallocate returned MSS spectrum. *See generally Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands*, Report and Order, Fourth Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 13356 (2004) ("*Big LEO Spectrum Sharing Order*").

29 *AWS Third Report and Order*, 18 FCC Rcd at 2238 (¶ 29).

30 There is no rational basis for the Commission to depart from its prior practice of conducting a rulemaking concerning spectrum reallocation. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." (footnotes omitted)); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (holding that the Commission must explain the different treatment of similarly situated parties). And any delay in spectrum reassignment caused by the requisite rulemaking is a very minimal burden, especially when contrasted with the inefficiency that would likely result from any assignment done without the benefit of a comprehensive examination of alternative spectrum uses.

31 *See AWS Third Report and Order*, 18 FCC Rcd at 2238 (¶ 28).

32 *Id.* at 2239 (¶ 32).

(Sound)."[33] Furthermore, the rulemaking proceeding should propose to authorize Sirius' use of the 24 MHz of reallocated 2 GHz spectrum by modifying Sirius' existing satellite DARS license pursuant to Section 316 of the Act.

V. CONCLUSION.

For the reasons set forth above, Sirius respectfully requests that the Commission initiate a rulemaking proceeding to reallocate the 24 MHz of unassigned 2 GHz MSS spectrum to satellite DARS and to authorize Sirius to use such spectrum for its satellite DARS system.

Respectfully submitted,

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[33] The ITU allocation can be addressed at WRC 2007 or 2008. Alternatively, the Commission could authorize Sirius to operate in the MSS spectrum with a waiver. In this scenario, Sirius would operate on a non-interference basis as to non-U.S. licensed systems.